

UNITED STATES OF AMERICA)
)
v.)
)
Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**Government Motion
to Take Judicial Notice**

3 August 2012

RELIEF SOUGHT

The United States in the above-captioned case requests this Court take judicial notice of the following adjudicative facts:

- (1) Army Regulation (AR) 25-2, paragraphs 1-4, 1-5, 3-3, 4-5, 4-16, 4-17, and figure B-1
- (2) AR 380-5, paragraphs 1-20, 1-21, 1-22; Chapter 2; Chapter 4 (Section I); Chapter 5 (Sections I and V); paragraphs 6-1, 6-2, 6-3, 7-4, 8-3, and 8-12;
- (3) AR 530-1, paragraphs 1-5, 1-6, 1-7, and 2-1;
- (4) 18 U.S.C. § 641;
- (5) 18 U.S.C. § 793(e);
- (6) 18 U.S.C. § 1030 (a)(1);
- (7) Executive Order 13526; and
- (8) Authorization for Use of Military Force

BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by preponderance of the evidence. RCM 905(c)(1). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. RCM 905(c)(2). The United States has the burden of persuasion as the moving party.

FACTS

The accused is charged with giving intelligence to the enemy, in violation of Article 104, Uniform Code of Military Justice (UCMJ). The accused is also charged with eight specifications alleging misconduct in violation of 18 U.S.C. § 793(e), five specifications alleging misconduct in violation of 18 U.S.C. § 641, two specifications alleging misconduct in violation of 18 U.S.C. § 1030(a)(1), five specifications alleging misconduct in violation of Article 92, UCMJ, and one specification alleging misconduct prejudicial to good order and discipline and service discrediting. See Charge Sheet.

WITNESSES/EVIDENCE

The United States requests this Court consider the referred charge sheet in support of its motion, as well as Enclosures 1-8.

APPELLATE EXHIBIT 248
PAGE REFERENCED: _____
PAGE ___ OF ___ PAGES

LEGAL AUTHORITY AND ARGUMENT

A judicially noticed fact must be “adjudicative” and “must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Military Rule of Evidence (MRE) 201.

A. Army Regulations

Army Regulation 25-2, dated 24 October 2007, provides the Army's Information Assurance (IA) policy, mandates, roles, responsibilities, and procedures for implementing the Army IA program. Paragraphs 1-4 and 1-5 address the purpose behind the Army IA program and provide an overview of the program. Paragraph 3-3 addresses the roles and responsibilities of IA support personnel. Paragraphs 4-5(a)(3) and 4-5(a)(4) discuss activities that are specifically prohibited by any authorized user on a Government-provided Information System or connection. Paragraph 4-16 addresses information systems media protection requirements and states that Army personnel will not transmit classified information over any communication systems unless using approved security procedures and practices. Paragraph 4-17 addresses the proper procedures for labeling, marking, and controlling information systems media. Figure B-1 is a template Acceptable Use Policy. The Accused is charged with attempting to bypass network or information systems security mechanisms, adding unauthorized software to a Secret Internet Protocol Router Network computer, and using an information system in a manner other than its intended purpose.

The existence of AR 25-2, dated 24 October 2007, is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to a source whose accuracy cannot be reasonably questioned.

The fact that AR 25-2, dated 24 October 2007, was in effect between 1 November 2009 and 27 May 2010, the time period in which the accused was alleged to have committed the charged misconduct in this case, is generally known and capable of accurate and ready determination by resort to the AR whose accuracy cannot be reasonably questioned.

The fact that the accused had a duty to obey AR 25-2 is a fact not subject to reasonable dispute. AR 25-2 applies to military personnel of the Active Army and applies to all users in all environments. AR 25-2, paragraph 1-5(j) states that “military and civilian personnel may be subject to administrative and/or judicial sanctions if they knowingly, willfully, or negligently compromise, damage, or place Army information systems at risk by not ensuring implementation of DOD and Army policies and procedures.”

AR 380-5 establishes policies for classification, downgrading, declassification, and safeguarding of information requiring protection in the interest of national security. Paragraphs 1-20, 1-21, and 1-22, discuss the corrective actions and sanctions that are taken when a violation of this regulation has occurred. Chapter 2 discusses the role of Original Classification Authorities, the classification process, derivative classification, security classification guides, and classification of non-government information. Chapter 4, Section I, discusses the proper procedures for marking documents. Chapter 5, Section I, discusses the proper handling of controlled unclassified information which also requires protection in order to prevent damage to the national security. Chapter 5, Section V, addresses sensitive information and discusses the proper procedures for

marking and handling this type of material. Paragraph 6-1 discusses the responsibilities of Department of the Army (DA) personnel in accessing classified information. Paragraph 6-2 discusses nondisclosure agreements and states that DA personnel will receive a briefing regarding their responsibilities in protecting classified information and will sign a classified information nondisclosure agreement (NDA). Paragraph 6-3 discusses the signing and filing of the NDA. Paragraph 7-4, discusses the standards for storage of classified information, and states that classified information that is not under the personal control and observation of an authorized person is to be guarded or stored in a locked security container, vault, room, or area, pursuant to the level of classification. Paragraph 8-3, discusses the proper methods for transporting and transmitting "SECRET" information. Paragraph 8-12, discusses the general provisions for escorting or hand carrying classified material. The accused is charged with, *inter alia*, improperly handling and storing classified material.

The existence of AR 380-5, dated 29 September 2000, is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to a source whose accuracy cannot be reasonably questioned.

The fact that AR 380-5, dated 29 September 2000, was in effect between 1 November 2009 and 27 May 2010, the time period in which the accused was alleged to have committed the charged misconduct in this case, is generally known and capable of accurate and ready determination by resort to the AR whose accuracy cannot be reasonably questioned.

The fact that the accused had a duty to obey AR 380-5 is a fact not subject to reasonable dispute. AR 380-5 applies to military personnel of the Active Army and applies to all users in all environments. AR 380-5, paragraph 1-21(a) subjects DA personnel to sanctions if they "knowingly, willfully, or negligently" do any of the following: "(1) Disclose classified or sensitive information to unauthorized persons, (2) Classify or continue the classification of information in violation of this regulation, (3) Violate any other provision of this regulation."

AR 530-1, dated 19 April 2007, addresses Army policy on Operations Security (OPSEC) program development, provides details on the OPSEC planning process, and outlines the OPSEC review, assessment, and survey. Paragraph 1-5 discusses the definition of OPSEC, critical information, sensitive information, and OPSEC compromise. Paragraph 1-6 discusses the requirement of each DOD component to have an OPSEC program and the purpose behind the requirement. Paragraph 1-7 discusses the application of OPSEC. Paragraph 2-1 addresses Army personnel operations security responsibility and the results of failure to implement OPSEC measures.

The existence of AR 530-1, dated 19 April 2007, is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to a source whose accuracy cannot be reasonably questioned.

The fact that AR 530-1, dated 19 April 2007, was in effect between 1 November 2009 and 27 May 2010, the time period in which the accused was alleged to have committed the charged misconduct in this case, is generally known and capable of accurate and ready determination by resort to the AR whose accuracy cannot be reasonably questioned.

The fact that the Accused had a duty to obey AR 530-1 is a fact not subject to reasonable dispute. AR 530-1 applies to military personnel of the Active Army and applies during all phases of operations. Army Regulation 530-1, paragraph 2-1(b)(2) states “a failure to comply with these orders, directives, or policies may be punished as violations of a lawful order under Article 92 of the UCMJ.”

B. Executive Order

Executive Order 13526 addresses classified national security information by prescribing a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. The order authorizes information to be classified when it concerns foreign relations or foreign activities of the United States.

The existence of Executive Order 13526, dated 29 December 2009, is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to the White House website at <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>, a source whose accuracy cannot be reasonably questioned.

The fact that Executive Order 13526, dated 29 December 2009, was in effect at the time the Accused was charged with compromising classified material, is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to the White House website at <http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>, a source whose accuracy cannot be reasonably questioned.

C. Federal Statutes

The existence of 18 U.S.C. § 641 is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to Title 18, United States Code, a source whose accuracy cannot be reasonably questioned.

The fact that 18 U.S.C. § 641 was in effect at the time the accused was charged with stealing or converting government property is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to Title 18, United States Code, a source whose accuracy cannot be reasonably questioned.

The existence of 18 U.S.C. § 793(e) is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to Title 18, United States Code, a source whose accuracy cannot be reasonably questioned.

The fact that 18 U.S.C. § 793(e) was in effect at the time the accused was charged with transmitting national defense information is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to Title 18, United States Code, a source whose accuracy cannot be reasonably questioned.

The existence of 18 U.S.C. § 1030(a)(1) is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to Title 18, United States Code, a source whose accuracy cannot be reasonably questioned.

The fact that 18 U.S.C. § 1030(a)(1) was in effect at the time the accused was charged with exceeding authorized access on a Secret Internet Protocol Router Network computer is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to Title 18, United States Code, a source whose accuracy cannot be reasonably questioned.

D. Joint Resolution


The Authorization for Use of Military Force authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”

The existence of the Authorization for Use of Military Force, signed into law 18 September 2001, is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to the U.S. Government Printing Office website at <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm>, a source whose accuracy cannot be reasonably questioned.


The fact that the Authorization for Use of Military Force, signed into law 18 September 2001, was in effect at the time the accused was charged a violation of Article 104, UCMJ, is a fact not subject to reasonable dispute. This fact is generally known and capable of accurate and ready determination by resort to the U.S. Government Printing Office website at <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm>, a source whose accuracy cannot be reasonably questioned.

CONCLUSION

For the reasons stated above, the United States requests the Court take judicial notice of the existence and the content of the above-mentioned portions of the Army Regulations, the Executive Order, the Federal Statutes, and the Joint Resolution, as they meet all the requirements of MRE 201.


JODEAN MORROW
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Defense Counsel via electronic mail, on 3 August 2012.


JODEAN MORROW
CPT, JA
Assistant Trial Counsel

8 Encls

1. AR 25-2, paragraphs 1-4, 1-5, 3-3, 4-5, 4-16, 4-17, and figure B-1
2. AR 380-5, paragraphs 1-20, 1-21, 1-22; Chapter 2, Chapter 4 (Section I); Chapter 5 (Sections I and V); paragraphs 6-1, 6-2, 6-3, 7-4, 8-3, and 8-12
3. AR 530-1, paragraphs 1-5, 1-6, 1-7, and 2-1
4. 18 U.S.C. § 641
5. 18 U.S.C. § 793(e)
6. 18 U.S.C. § 1030 (a)(1)
7. Executive Order 13526
8. Authorization for Use of Military Force